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No. .....

In The

Supreme Court of the United States

October Term, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION AND THE SIERRA PACIFIC POWER COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals failed to give appropriate deference to the Federal Energy Regulatory Commission (FERC) in the interpretation of FERC's own authorizing statute, the Federal Power Act, 16 U. S. C. § 791a et seq.

2. Whether the Court of Appeals' interpretation of Section 3 (8) of the Federal Power Act, 16 U. S. C. § 796 (8), is contrary to the plain meaning of the statute.

3. Whether the Court of Appeals failed to give proper deference to the Federal Energy Regulatory Commission in the weighing and interpretation of the evidence.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Pyramid Lake Paiute Tribe of Indians respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 20, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 681 F. 2d 1134 (9th Cir. 1982) and is reproduced in App. 1-14. The opinions of the Federal Energy Regulatory

Commission are reported at 18 FPS 5-922 and 21 FPS 5-242 respectively. Both are reproduced in App. 14-28, 29-93.

JURISDICTION

The judgment of the Court of Appeals was entered July 20, 1982. A timely petition for rehearing filed by the Pyramid Lake Paiute Tribe was denied on August 27, 1982. A timely petition for rehearing filed by the Federal Energy Regulatory Commission was denied on September 30, 1982, and this petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

STATUTE INVOLVED

Section 3 (8) of the Federal Power Act, 16 U. S. C. § 796 (8) provides:

> (8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or

rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority; . . .

STATEMENT OF THE CASE

Petitioner seeks summary reversal of the decision of the Ninth Circuit Court of Appeals finding the Truckee River *not* to be a navigable water within the meaning of Section 3 (8) of the Federal Power Act.

The Truckee River in Nevada and California is the lifeline of the Pyramid Lake which is located within the Pyramid Lake Indian Reservation. The Lake's fishery is the principal source of livelihood of the Pyramid Lake Paiute Tribe, and the Truckee River provides fresh water recharge to the Lake and serves as a spawning and rearing ground for the fishery. The Truckee River originates in California as the outlet to Lake Tahoe, a natural alpine lake located in both California and Nevada, and flows for approximately 33 miles northeasterly across the California/Nevada stateline and then for approximately 80 miles in Nevada before emptying into Pyramid Lake which is entirely encompassed within the Pyramid Lake Indian Reservation.

The Tribe filed a petition and complaint before the Federal Power Commission, now the Federal Energy Regulatory Commission, in 1975 seeking an order that four hydro-electric power plants owned and operated by Sierra

Pacific Power Company on the Truckee River were operating illegally without a license. The asserted basis for the Commission's jurisdiction, among others, was that the Truckee River is navigable within the meaning of section 3 (8) of the Federal Power Act, 16 U. S. C. § 796 (8).[1] The Tribe's interest was based on its contention that the power plants are operating in a manner detrimental to the maintenance and preservation of the Truckee River and Pyramid Lake fisheries.[2]

In two detailed and comprehensive opinions, App. 14-28, 29-93, the Commission found the Truckee River to be navigable and Sierra Pacific's four power plants on the river subject to the Commission's licensing jurisdiction. Sierra Pacific sought review of the Commission's decisions by the Ninth Circuit Court of Appeals. On review, the Ninth Circuit reversed and remanded the Commission's decision and orders. The Court focused on the specific stateline reach of the river and found that although the Truckee is a navigable intrastate waterway, App. 12, it is not a navigable water of the United States because there was no substantial evidence that the stateline portion of the river was either used or suitable for use for navigation purposes. App. 10-11. The court also found that the interstate portion of the river did not qualify as an interruption com-

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[1]The Commission staff supported the Tribe's position on the navigability of the Truckee and the jurisdiction of the Commission.

[2]The issue of the Pyramid Lake Paiute Tribe's right to sufficient water to maintain the Pyramid Lake fishery is being pursued in State of Nevada, et al. v. United States, et al., Nos. 81-2245, 81-2276 and 82-38, certiorari accepted, 51 U. S. L. W. 3287 (Oct. 12, 1982).

pelling land carriage under section 3 (8) of the Federal Power Act, 16 U. S. C. § 796 (8), because it found no substantial evidence of actual use of the interstate portion of the river or any instances of commerce across the state-line with the aid of portages. App. 12. Finally, the court declined to find the improvements authorized on the Truckee were adequate to bring the Truckee within the meaning of section 3 (8) and therefore navigable in law because the improvements were for flood control or reclamation, not navigation. App. 13-14.

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REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's decision totally ignores the controlling principles of statutory construction applicable to this case and reaches a result that is inconsistent with those principles.

Numerous decisions of this Court establish that courts are required to give "great deference" to interpretations by administrative agencies of the statutes they are required to administer. *E. g., EPA v. National Crushed Stone Ass'n.*, 449 U. S. 64, 83 (1980). *See also, CBS, Inc. v. FCC*, 453 U. S. 367, 382 (1981); *FCC v. WNCN Listeners Guild*, 450 U. S. 582, 598 (1981) (construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong). This is most especially true when an agency is interpreting the scope of its authorizing statute. *Board of Governors v. First Lincolnwood Corp.*, 439 U. S. 234, 251 (1978).

The Ninth Circuit's decision does not even pay lip service to these fundamental canons of construction. They are not mentioned in its opinion. It is clear that the court simply adopted its own interpretations of section 3 (8) of the Federal Power Act, as if it were writing on a clean slate. Thus, for example, in rejecting the Commission's position that any improvements authorized by Congress under its commerce powers are sufficient to bring the waterway within the definition of section 3 (8), the Court of Appeals simply stated that "[w]e do not adhere to the Commission's view." App. 13. Similarly, the Court of Appeals acknowledged that the stateline reach of the Truckee River "arguably fits [the] description" in section 3 (8) of an interruption between navigable parts of the Truckee River, but went on to express its disagreement with the Commission's construction of its governing statute. App. 12.

The lower court never even looked for, no less found, any "compelling indication" that the Commission's interpretations are wrong or unreasonable. No such conclusions could have been reached since the Commission's positions are consistent with the plain meaning of section 3 (8) and the overall purpose of the Federal Power Act and are supported by several additional canons of construction. *See infra* at pp. 14-15.

The Court of Appeal's departure from the well-established rules governing judicial review of an administrative agency's construction of its own governing statute is demonstrated rather starkly by a subsequent decision rendered by a different panel of the same court. In *Escondido Mutual Water Company v. FERC*, — F. 2d — (9th Cir. Nos.

79-7625, 80-7012, 80-7110, November 2, 1982), the Ninth Circuit upheld the Commission's jurisdiction over a water diversion project that generates a miniscule amount of power. The court affirmed the Commission's "very expansive reading" of the Federal Power Act because the Commission's view was entitled to "great deference" and is not "so unreasonable as to require reversal."[3] Application of these same standards to the case at bar obviously would have produced a different result. *Cf. Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982) (court of appeals belatedly acknowledged controlling standard of review but its opinion reflects that it did not accord proper deference to the district court's findings).

This Court should grant this petition and summarily reverse the Ninth Circuit's judgment with instructions to give great deference to the Commission's interpretations of the Federal Power Act and to uphold those interpretations if they are found to be reasonable.

2. The Ninth Circuit's decision conflicts with decisions of other circuits construing section 3 (8) of the Federal Power Act. The Ninth Circuit's interpretation of section 3 (8) which focuses only on the navigability of the stateline reach of the river stands alone among the decisions in determinations of the navigable waters of the United States. The court's analysis is directly contrary to decisions of other circuits and to other decisions of the Ninth Circuit itself. *See Rochester Gas & Electric Corp. v. Federal Power Commission*, 344 F. 2d 594, 597 (2d Cir.

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[3]The relevant portion of this as yet unpublished opinion is reproduced in the Appendix to this Petition. App. 94-100.

1965); *Montana Power Co. v. FPC*, 185 F. 2d 491 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 947 (1951); *Puget Sound Power & Light Co. v. FERC*, 644 F. 2d 785 (9th Cir. 1981). These cases show that while an interstate linkage by water is a prerequisite, the navigability of the specific stateline reach is not the determining factor for a finding that the river is a navigable water of the United States. In none of these cases did the status of the river rise or fall on the basis of the navigability of the specific stateline portion.

Indeed, section 3 (8) of the Federal Power Act specifically refers to *"those parts of streams* . . . [which] are used or suitable for use for the transportation of persons or property in interstate or foreign commerce. . . ." (Emphasis added.) And the Commission's jurisdiction has been upheld over hydroelectric plants located on parts of streams that support only intrastate navigation. *Rochester Gas & Electric Co. v. FPC*, 344 F. 2d 594 (2d Cir. 1965); *Montana Power Co. v. FPC*, 185 F. 2d 491 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 947 (1951).

An interstate connection is necessary for the Commission to exercise jurisdiction and such a connection exists in this case by virtue of the fact that the Truckee River flows from California to Nevada.[4] This is sufficient to establish its interstate status. *See Kaiser Aetna v. U. S.*, 444 U. S. 164, 166-167 (1979) (the body of water at issue was a navigable water of the United States because of its

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[4]In addition, the Truckee flows out of Lake Tahoe which is itself a navigable water of the United States. Davis v. United States, 186 F. 2d 938 (9th Cir. 1950). If the Truckee River is otherwise navigable then it is a navigable water of the United States by virtue of its connection with Lake Tahoe.

connection with the Pacific Ocean); *The Steamer Daniel Ball v. U. S.*, 77 U. S. 557 (1871) (the Grand River is located entirely within the borders of the Michigan but empties into Lake Michigan and is thus a navigable water of the United States); *U. S. v. The Steamer Montello*, 87 U. S. 430 (1874) (the Fox River located in Wisconsin empties into Green Bay, thus forming a continued highway for interstate commerce); *Puget Sound Power & Light Co. v. FERC*, 644 F. 2d 785, *supra* (the White River is a navigable water of the United States presumably because of its connection with Puget Sound); *Rochester Gas and Electric Co. v. FPC*, 344 F. 2d 594, *supra* (the Genesee River arises in Pennsylvania, flows through New York to Lake Ontario and it is thus a navigable water of the United States).[5]

Neither is it necessary for actual commerce to take place across the stateline. As the court said in *Rochester Gas and Electric*, 344 F. 2d at 597:

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[5]The cases relied on by the court involved waterways which were wholly intrastate. See National Wildlife Federation v. Alexander, 613 F. 2d 1054, 1058-61 (D. C. Cir. 1979) (involved Devils Lake, a natural lake wholly within the State of North Dakota); Hardy Salt Co. v. So. Pacific Transportation Co., 501 F. 2d 1156, 1167 (10th Cir. 1974), *cert. denied sub nom.* Sanders Brine Shrimp Co. v. Southern Pacific Transportation Co., 419 U. S. 1033 (1974) (involved the Great Salt Lake, a navigable lake wholly within the State of Utah); and Minnehaha Creek Watershed District v. Hoffman, 597 F. 2d 617, 623 (8th Cir. 1979) (involved Lake Minnetonka located wholly within the State of Minnesota). The latter case also involved Minnehaha Creek, a creek located entirely within Minnesota but which eventually flows into the Mississippi River. In this regard, the holding in *Minnehaha Creek* may be in conflict with this court's decisions in Kaiser Aetna v. U. S., 444 U. S. 164 (1979) and The Steamer Daniel Ball v. U. S., 77 U. S. 557 (1871), but in any event, the case involved the different language of Section 10 of the Rivers and Harbors Act of 1899, 33 Stat. § 403.

> Petitioner also contends that there is no evidence that goods shipped down river entered into interstate commerce. Perhaps the Commission was justified in inferring that some of these goods eventually must have crossed state or national boundaries. In any event, we agree with the Commission that actual use of a river for intrastate shipments demonstrates its suitability for use as a connecting waterway for interstate or foreign commerce. Especially is this true where the river runs directly into acknowledged avenues of interstate or foreign commerce, here the Erie Canal and Lake Ontario.

See also, Puget Sound Power & Light Co. v. FERC, supra.

Allowing the Ninth Circuit's decision to stand would cast doubt on the Commission's jurisdiction over countless projects located on waterways on which the stateline reach was not actually used for river transportation or where there are rapids, falls, or other interruptions to interstate navigation located above and below the projects.

3. The Ninth Circuit's decision also conflicts with the plain meaning of section 3 (8) which defines "navigable waters" as including "interruptions between the navigable parts." Such interruptions are specifically included as part of the navigable waterway and within the jurisdiction of FERC.[6]

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[6]FERC determined that a fourteen mile stretch of the river which included the stateline portion is navigable in fact or suitable for navigation. App. 65, 69-71. In the alternative, the Commission determined that the 14 mile stateline stretch qualifies as an interruption between navigable parts. App. 67. Only two of Sierra Pacific's plants are located on the stateline portion examined by the Commission. The other two plants are located on other portions of the river which the Commission found, and the Ninth Circuit acknowledged, are navigable. App. 64-65.

The court conceded that the stateline reach of the Truckee "arguably fits this description" but declined to find the area within FERC jurisdiction because it concluded that the stateline reach was not navigable in fact. App. 12. The court's holding is simply contrary to the plain meaning of the statute which includes "interruptions between the navigable parts."[7]

The consideration of this issue in the Court of Appeals' opinion is flawed because it incorrectly assumes that there must be actual evidence of portage or land carriage. App. 12. The statute does not impose such a requirement. It merely describes "interruptions . . . compelling land carriage," as opposed to referring, for example, to "interruptions . . . which have compelled land carriage." The definition as a whole is inconsistent with a requirement for proving actual land carriage because section 3 (8) expressly encompasses not only parts of streams that have actually been used as highways for interstate or foreign commerce, but also parts of streams that are "suitable" for such use.

The stateline interruption between the navigable portions of the Truckee River is suitable for land carriage and therefore qualifies as an "interruption . . . compelling land carriage." The Commission so held. App. 66-67. That holding is supported by prior case law. *Montana, supra,* relying on *Economy Light & Power Co. v. United States,* 256 U. S.

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[7]The court's holding is also contrary to that part of the definition in section 3 (8) which includes not only waterways which are navigable in fact, but those suitable for navigation. See The Steamer Daniel Ball, *supra,* and U. S. v. Appalachian Electric Power Co., 311 U. S. 337, 407-408 (1940).

113, 122 (1921), and *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 408-09 (1940), held that an "interruption . . . compelling land carriage" did not deny a portion of a river its status as a "navigable water." The *Montana* court did not require any actual evidence of land carriage. 185 F. 2d at 494. The Commission expressly relied on that same statement from *Economy Light*. App. 59 n. 45.

The Court of Appeals' decision is inconsistent with these authorities insofar as it insists on actual proof of land carriage. Further, the Commission's interpretation of this portion of its governing statute is not clearly outside of its authority and is plainly a reasonable construction even if it is not the only reasonable one. Accordingly, it is entitled to substantial deference and should be followed. *See supra* at pp. 5-7.

The legislative history of section 3 (8) confirms the meaning of the words in the statute. The definition in section 3 (8) was specifically amended to include nonnavigable parts of streams that interrupt navigable parts.

> This amendment recasts the House defintion as to the term "navigable waters," the House agreeing to the Senate definition with an amendment inserting after the word "interruptions" the words "between the navigable parts of such streams or waters," thus making it clear that *although the navigable parts of such streams may be interrupted by falls, shallows, or rapids, the portions occupied by falls, shallows, or rapids are within the jurisdiction of Congress and that no dams can be constructed at, upon, or across such falls, shallows, or rapids, without securing a license as provided in the bill.* Under the House definition of "navigable waters" it might be possible to construct dams at the very point where dams would

have to be located without securing such license. (Emphasis added.)

H. Rep. No. 910, 66th Cong., 2d Sess. 7 (1920).

Congress obviously contemplated situations where there may be non-navigable portions of an otherwise navigable stream and chose to include them within the definition of navigable waters. Congress was aware that it is in the nature of hydroelectric power plants that the most advantageous locations on a river to construct such plants are precisely those areas of steep gradient and swiftly moving waters. A sharp drop between the point of diversion of the water to the powerhouse is an essential element in the generation of the power. It is natural then that power plants should be located in these areas of falls or rapids or other steep parts of a river, areas which are not often conducive to navigation. Yet, if these areas were not included within the definition of navigability, FERC would not have jurisdiction over a significant number of those power plants which are constructed in the most suitable locations.

4. The Ninth Circuit's decision also conflicts with the plain meaning of that part of section 3 (8) which includes those parts of rivers which "have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation of its authority."[8] The Court held that flood control and reclamation improvements are not encompassed within this part of the definition, al-

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[8]As an alternative ground for finding the Truckee River navigable, the Commission found that the stateline reach of the river had been "authorized by Congress for improvement by the United States." App. 74-80.

though the provision is not limited to navigational improvements.

The definition of navigable waters in section 3 (8) includes both those "parts of streams . . . which in their natural or *improved* condition . . . are used or suitable for use for the transportation of persons or property in interstate or foreign commerce . . . *together with such other parts of streams* as shall have been authorized by Congress for improvement." (Emphasis added.) The first "improved" clause clearly refers to navigational improvements, but the second "improvement" clause obviously includes portions of streams other than those that are used or suitable for use in interstate or foreign commerce. To find otherwise, as the Ninth Circuit did, would render the second "improvement" clause meaningless and superfluous. To give any meaning at all to the "improvement" clause, it must refer to other kinds of improvements than navigational improvements.[9]

The court's decision also conflicts with the overall purpose of the Federal Power Act:

> to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; *these uses included navigation, irrigation, flood control, and very prominently, hydroelectric power--uses*

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[9]Such an interpretation would comport with the rule that a court must give effect, if possible, to every word Congress used and must avoid interpretations that render a provision superfluous and drain it of all significance. Wilson v. Omaha Indian Tribe, 442 U. S. 653, 665-66 (1979); Reiter v. Sonotone Corp., 442 U. S. 330, 339 (1979); Colautti v. Franklin, 439 U. S. 379, 392 (1979).

> *which, while unregulated, might be contradictory rather than harmonious.*

FPC v. Union Electric Co., 381 U.S. 90, 98 (1965) (emphasis added). The Court's limiting construction of section 3 (8) undermines the Act's purpose by unnecessarily excluding projects from the Commission's jurisdiction that are well within the federal government's constitutional powers. This contravenes another vital canon of construction, that the purpose of the statute controls even its literal language. *Steelworkers v. Weber* 443 U.S. 193, 201-02 (1979); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 607-08 (1979); *Philbrook v. Glodgett*, 421 U.S. 707, 713-14 (1975).[10]

In sum, the Court of Appeals' application and interpretation of the improvements clause of section 3 (8) should be rejected because: (i) it is not in accord with its plain meaning; (ii) it renders part of section 3 (8) meaningless and superfluous; (iii) it conflicts with the statute's overall purpose; and (iv) it totally ignores and gives no deference at all to the Commission's construction of its own governing statute.

5. Finally, review is appropriate in this case because the court below failed to give proper deference to FERC

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[10]The authority cited by the Court of Appeals does not support its interpretation of Section 3 (8). In Montana Power Co. v. FPC, 185 F. 2d 491, 495 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 947 (1951), the only relevant improvement authorized by or recommended to Congress qualified as an aid for navigation. Consequently, the court did not consider or decide whether other kinds of improvements are encompassed in the definition. And to the extent that an interstate connection is required for the provision to be operable, see National Wildlife Federation v. Alexander, *supra*, it exists here. See discussion above at p. 8.

in the weighing of the evidence. Here, the court reweighed and re-interpreted the evidence. In doing so, the court went far beyond its "essentially narrow and circumscribed" role in reviewing agency decisions. *Permian Basin Area Rate Cases*, 390 U. S. 747, 766 (1968).

The court selectively reviewed the evidence relied on by the Commission to find the stateline reach of the river to be navigable in fact or suitable for navigation. *Compare* the Commission's analysis of this portion of the river, App. 44-71, with the court's analysis, App. 10-11. On the basis of this selective review of the evidence, the court declined to follow the Commission's ruling that the stateline reach is navigable in fact. App. 10. Suitability for navigation was similarly dismissed although no examination of the evidence on improvements was made. App. 10-11.

The weighing of the evidence is primarily the task of the agency, *Ralston Purina Co. v. Louisville & Nashville R. Co.*, 426 U. S. 476 (1976), and the agency's conclusions must be respected even if "the issue might 'with nearly equal reason be resolved one way rather than another.'" *Bayside Enterprises, Inc. v. NLRB*, 429 U. S. 298, 301 (1977). *See Consolo v. Federal Maritime Commission*, 383 U. S. 607, 620 (1966). The court did not find the agency's interpretation unreasonable, but instead "improperly substituted its own view of the facts for those of the [Commission]." *NLRB v. Pipefitters*, 429 U. S. 507, 532 (1977). *See also, INS v. Wang*, 450 U. S. 139, 144 (1981) (per curiam); *E. I. DuPont de Nemours & Co. v. Collins*, 432 U. S. 46, 54-57 (1977).

CONCLUSION

For the reasons stated the Court is respectfully requested to grant a writ of certiorari.

Respectfully submitted,

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